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Supreme Court, U.S.
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Docket No. 97 1233 NOV 25 1997

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IN THE SUPREME COURT OF THE

UNITED STATES OF AMERICA

October, 1997 Term

RON PAUL, SR., ANGELA PAUL, RON PAUL, JR., BRIAN PAUL, STEPHEN PAUL,

Petitioner(s),

vs.

A. LEVY & J. ZENTNER CO., a California Corporation, and DOES 1 through 100,

Respondent(s).

ON PETITION FOR WRIT OF CERTIORARI FOR THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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81 pp

## QUESTIONS PRESENTED FOR REVIEW

I. Whether the "excusable neglect' standard enumerated in Pioneer Investments Services Co. v. Brunswick Associates, Ltd. Partnership (1993) 507 U.S. 380, 113 S.Ct. 1489, was properly applied by the Ninth Circuit to Federal Rules of Bankruptcy, Rule 8002?

II. Where the "excusable neglect' standards enumerated in Pioneer Investments Services Co. v. Brunswick Associates, Ltd. Partnership (1993) 507 U.S. 380, 113 S.Ct. 1489, are found applicable to Federal Rules of Bankruptcy, Rule 8002, did the Ninth Circuit correctly affirm the decision of the District Court wherein the "reason for delay" element was determinative of the Court's finding?

## PARTIES TO THE PROCEEDING

The parties to the proceeding of the United States Court of Appeals for the Ninth Circuit were as follows:

| | |
|---|---|
| Plaintiffs/Appellants: | RON PAUL, SR., ANGELA PAUL, RON PAUL JR., BRIAN PAUL, and STEPHEN PAUL |
| Defendants/Appellee: | A. LEVY & J. ZENTNER CO., a California Corporation |

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I.

## BASIS FOR JURISDICTION

The United States Supreme Court has jurisdiction over this matter pursuant to 28 U.S.C.A. §1254. The Appeal is from a final order of the United States Court of Appeals for the Ninth Circuit, entered on August 27, 1997.

II.

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND/OR REGULATIONS

The following constitutional provisions, treaties, statutes, ordinances and/or regulations are involved in this case:

I. Federal Rules of Bankruptcy, Rule 8002(c):

The bankruptcy judge may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be made before the time for filing a notice of appeal has expired, except that a request made no more than 20 days after the expiration of the time for filing a notice of

appeal may be granted upon a showing of excusable neglect if the judgment or order appealed from does not authorize the sale of any property or the obtaining of credit or the incurring of debt under § 364 of the code, or is not a judgment or order approving a disclosure statement, confirming a plan, dismissing a case, or converting the case to a case under another chapter of the Code.

III.

## STATEMENT OF THE CASE

On or about January 15, 1993, Pipco Fruit Company filed a voluntary petition for bankruptcy under Chapter 11. On January 26, 1994, a reorganization plan was confirmed. Petitioners, RON PAUL, SR., ANGELA PAUL, RON PAUL JR., BRIAN PAUL, and STEPHEN PAUL (hereinafter "Petitioners"), are the general partners of Pipco Fruit Company.

On or about February 1, 1995, Petitioners brought an action in the Fresno County Superior Court against Respondent, A. LEVY & J. ZENTNER CO., a California Corporation (hereinafter "Respondent"). This action was

removed to the bankruptcy court for the Eastern District of California on February 27, 1995.

On February 28, 1995, Respondent moved for dismissal of the complaint and for summary judgment. On April 24, 1995, the bankruptcy court granted the motion in open court and in the presence of both parties' counsel. Petitioners were served with the written order and final judgment on April 27, 1995.

Upon receipt of the written order and judgment, the secretary in charge of opening incoming mail and calendaring hearing dates in Petitioners' counsel's office, mistakenly calendared the deadline for the notice of appeal in the case for thirty (30) days from the date of the order. Thereafter, the secretary put the order and judgment on the desk in an empty office which was to be occupied by a new associate assigned to work on the appeal in the case. The associate was scheduled to arrive on May 15, 1995.

On May 19, 1995, Petitioners' counsel filed a notice of appeal and motion to extend time to file a notice of appeal.

On June 26, 1995, the bankruptcy court denied the motion to extend time to file the notice of appeal on

procedural grounds, relying on In re Mouradick, (9th cir. 1994) 13 F.3d 326. In addition, the bankruptcy court found that Petitioners had not shown that their failure to file a timely notice of appeal was due to excusable neglect.

On or about July 3, 1995, Petitioners timely filed a notice of appeal from the order denying the motion to extend time to file notice of appeal. Federal Jurisdiction of the court of first instance was based upon 28 United States Code § 1334.

On or about May 24, 1996, the United States District Court, Eastern District of California (hereinafter "District Court") entered its judgment affirming the bankruptcy court's denial of Petitioners' motion to extend time to file notice of appeal. According to the District Court, Petitioners, while admitting neglect on the part of their counsel, failed to establish whether such neglect was "excusable" for purposes of the standard set forth in Pioneer Investments Services Co. v. Brunswick Associates, Ltd. Partnership (1993) 507 U.S. 380, 113 S.Ct. 1489.

On or about June 19, 1996, Petitioners filed a timely notice of appeal from the Order of the District Court. On or

about August 27, 1997, the Ninth Circuit Court of Appeals affirmed the ruling of the District Court. According to the Ninth Circuit Court of Appeals, the District Court did not abuse its discretion in concluding that there was no showing of "excusable neglect" under those standards set forth in Pioneer Investments Services Co. v. Brunswick Associates, Ltd. Partnership, supra, 507 U.S. 380, 113 S.Ct. 1489.

## IV.

## ARGUMENT

### A. COURT SHOULD REVIEW OPINION OF NINTH CIRCUIT IN LIGHT OF CONFLICT WHICH EXISTS OVER WHETHER OR NOT THE STANDARDS OF "EXCUSABLE NEGLECT" ENUMERATED IN PIONEER INVESTMENT SERVICES CO. ARE APPLICABLE TO FEDERAL RULES OF BANKRUPTCY, RULE 8002.

Federal Rules of Bankruptcy, Rule 8002 governs the time for filing a notice of appeal from the decision of the Bankruptcy Court. According to Federal Rules of Bankruptcy,

Rule 8002, a notice of appeal is properly filed, "within 10 days of the date of the entry of the judgment, order, or decree appealed from." [Federal Rules of Bankruptcy, Rule 8002(a).] In the instance where additional time is needed for the filing of a notice of appeal, Federal Rules of Bankruptcy, Rule 8002(c), allows for the filing of a request to extend the time for filing of a notice of appeal. As stated within Federal Rules of Bankruptcy, Rule 8002(c), a request to extend the time for filing a notice of appeal must be filed; (1) before the 10 day deadline for filing a Notice of Appeal has expired, or (2) ***upon a showing of excusable neglect***, no more than 20 days after the expiration of the time for filing a Notice of Appeal. [See, Federal Rules of Bankruptcy, Rule 8002(c).]

In Pioneer Investments Services Co. v. Brunswick Associates, Ltd. Partnership, supra, 507 U.S. 380, 113 S.Ct. 1489, this Court set forth the factors for determining whether neglect is excusable for purposes of Federal Rules of Bankruptcy, Rule 9006. According to this Court, the relevant factors to be examined by the lower courts for the purpose of determining "excusable neglect" should include:

"(1) the danger of prejudice to the debtor, (2)

the length of delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith." [Pioneer Investment Services Co., supra, 507 U.S. 380, 113 S.Ct. at 1497-98.]

Since 1993, however, the application of those factors enumerated by this Court in Pioneer Investment Services Co., have been extended by many of the lower courts to matters outside Federal Rules of Bankruptcy, Rule 9006, and the entire bankruptcy arena. [See e.g., Kyle v. Campbell Soup Co. (9th Cir. 1994) 28 F.3d 928; see also, Resolution Trust Corp. v. Alhambra Holdings, Inc. (D. Kan. 1996) U.S. Dist. LEXIS 4762.]

The extension of the Pioneer Investment Services Co. "excusable neglect" standards to matters outside Federal Rules of Bankruptcy, Rule 9006, has included in some regard, an extension of application to Federal Rules of Bankruptcy, Rule 8002. In decisions like that issued in Turner v. Rute (Bankr. C.D. Ill. 1994) 173 B.R. 165, many of the lower courts

have extended the Pioneer Investment Services Co. "excusable neglect" standards to Federal Rules of Bankruptcy, Rule 8002, based upon the similarity in policy considerations between Federal Rules of Bankruptcy, Rule 8002, and other rules and code sections to which the standards have also been applied. [See, e.g., Christopher v. Diamond Benefits Life Ins. Co. (Matter of Christopher) (5th Cir. 1994) 35 F.3d 232.] However, the application has ***NOT*** been unanimous.

In re Mowers (Bankr. N.D.N.Y. 1993) 160 B.R. 720, the Court explicitly refused to extend the application of the Pioneer Investment Services Co. "excusable neglect" standards to Federal Rules of Bankruptcy, Rule 8002. Specifically, the Court stated:

> "[T]he time frames provided under Fed. R. Bankr. P. 8002 are specifically excepted from the reach of Fed. R. Bankr. P. 9006(1) . . . Indeed, the policy considerations cited by the Supreme Court as supporting its determination to apply a more liberal 'excusable neglect' standard under Fed.R. Bankr.P. 9006(b)(1) in the context of a late filed proof of claim under

Fed.R.Bankr.P. 3003(c), to wit, 'avoiding forfeitures by creditors' [citation omitted], are not generally supportive of the abbreviated time constraints for filing a notice of appeal in bankruptcy which are jurisdictional in nature and serve to '[assure] prompt appellate review often important in the administration of a case under the Code.'" [Citing, Advisory committee Note on Fed.R.Bankr.P. 8002, Norton Bankr. Rules Pamphlet 1992-93 Ed. P. 532.]

The Mowers Court, after rejecting application of the Pioneer Investment Services Co. "excusable neglect" standards, determined that the proper standard for determining "excusable neglect" for purposes of Federal Rules of Bankruptcy, Rule 8002, was set forth in the case law of the Second Circuit. According to the Mowers Court:

"'[A] finding of excusable neglect must be based on either acts of someone other than appellant or his or her counsel, or some extraordinary event. Such a finding may not be based on common oversight or

administrative failure by the would-be appellant's counsel'." [In re Mowers, supra, 160 B.R. 720, 725; citing, Matter of G. General Elect. Components (Bankr.D.Conn 1990) 113 B.R. 122, 123; citing also, In re Hotel Syracuse, Inc. (N.D.N.Y. 1993) 154 B.R. 13.]

In this case, the Ninth Circuit Court of Appeals based its decision **solely** upon the Pioneer Investment Services Co. "excusable neglect" standards.[1] The Ninth Circuit Court of Appeals made ***absolutely no*** mention, and/or presented no analysis, of the facts under the "excusable neglect" standard set forth in In re Mowers (Bankr. N.D.N.Y. 1993) 160 B.R. 720. The Ninth Circuit Court of Appeals omitted such analysis, even though the potential dispute in the actual standard to be applied was noted in the opinion of the District Court.

Petitioners therefore ask this Court to determine

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[1] In its decision, the Ninth Circuit Court of Appeals cited Pioneer Investment Services Co., supra, 507 U.S. 380, 113 S.Ct. 1489, in support of its statement: "The Supreme Court has set out the standard to determine whether excusable neglect exists in the context of a bankruptcy rule."

whether the Pioneer Investment Services Co. "excusable neglect" standards have been properly applied by the District Court, and other lower courts, to Federal Rules of Bankruptcy, Rule 8002. Pursuant to Supreme Court Rules, Rule 10, where a conflict in the decisions of state courts of last resort and/or the United States Courts of Appeals exists, it is properly within the exercise of this Court's supervisory powers to review the matter for determination.

## B. DUE TO CONFLICTING APPROACHES IN APPLYING STANDARDS OF "EXCUSABLE NEGLECT" ENUMERATED IN PIONEER INVESTMENT SERVICES CO., COURT SHOULD REVIEW DECISION OF NINTH CIRCUIT APPROVING DISTRICT COURT'S EMPHASIS ON "REASON FOR DELAY" ELEMENT.

In Pioneer Investment Services Co., supra, 507 U.S. 380, 113 S.Ct. 1448, this Court set forth those circumstances which should be examined when determining whether "excusable neglect" has occurred in the course of litigation.

The standards include:

> "(1) the danger of prejudice to the debtor, (2) the length of delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith." [Pioneer Investment Services Co., supra, 507 U.S. 380, 113 S.Ct. at 1497-98.]

Since this Court's 1993 decision in Pioneer Investment Services Co., supra, 507 U.S. 380, 113 S.Ct. 1489, the lower courts have disagreed on what factors are most important for, and support a finding of, "excusable neglect". In In re Official Committee of Unsecured Creditors of Investors & Lenders Ltd. v. Field (Bankr. D. N.J. 1994) 169 B.R. 546, the court focused on the reason for the missed deadline in determining that no "excusable neglect" existed. The court in In re Nickels Performance Systems Inc. (Bankr. E.D. Tenn. 1994) 169 B.R. 647, did the same. However, in U.S. States Lines Inc. v. U.S. (Bankr. S.D.N.Y. 1996) 196 B.R. 670 and W-V Enterprises Inc. v. Croft (Bankr. W.D. Mo. 1994) 174 B.R. 525, the courts

determined that the movant's weak reason for delay was not pivotal to a finding of "excusable neglect" under the Pioneer Investment Services Co. Furthermore, in some instances, the confusion has even led courts to incorporate the more stringent standards of those cases preceding Pioneer Investment Services Co. [See, e.g., Key Bar Investments Inc. v. Cahn (9th Cir. BAP 1995) 188 B.R. 627; see, also, Hirsch v. London Steamship Owners' Mutual Life Ins. Assoc. Lts. (Bankr. S.D.N.Y. 1996) 198 B.R. 45.].

In this case, the Ninth Circuit Court of Appeals held that the District Court did not "abuse" its discretion in determining that no "excusable neglect" had been shown to exist in the failure of Petitioners' counsel to timely file the motion to extend time to file notice of appeal. In its decision, the District Court, ***finding no prejudice and/or significant delay caused by the negligence of Petitioners' counsel***, focused on the reason for the missed deadline in determining that no "excusable neglect" existed.[2] As stated by this Court,

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[2]The District Court stated, "[t]he focus of the test is no so much on the absence of prejudice as it is on the nature, quality of, and reason for the neglect: i.e., its cause."

however:

> [T]he lack of any prejudice to 'other parties' or to the interests of efficient judicial administration, combined with the good faith of Petitioners and their counsel, weigh strongly in favor of committing the tardy claim. [Pioneer Investment Services Co., supra, 507 U.S. 380, 398.]

The Ninth Circuit Court of Appeals and District Court, seem to have ignored this mandate.

The failure of the Ninth Circuit Court of Appeals and District Court to accord proper weight, in this case, to the prejudice and good faith elements of Pioneer Investment Services Co. is only one obvious example of the confusion which has arisen among the lower courts regarding the proper application of the "excusable neglect" enumerated by this tribunal. Without determinative guidance as to how the "excusable neglect" standards are to be applied, courts will continue to subjectively apply the standards without regard for a consistent application of the law. Furthermore, as is already evident in the decisions of some lower courts, the confusion

regarding the application of the Pioneer Investment Services Co. "excusable neglect" standards may lead more courts to resurrect those strict and unbending standards of the past which this Court sought to avoid.

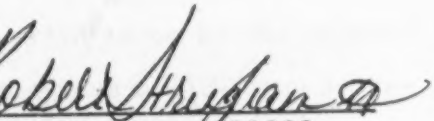
V.

## CONCLUSION

Pursuant to Supreme Court Rules of Court, Rule 10, Petitioners ask this Court to grant their Petition for Writ of Certiorari. As outlined herein, the evident split of jurisdictional precedent over; (1) the application of Pioneer Investment Services Co. "excusable neglect" standards to Federal Bankruptcy Rules, Rule 8002, and/or (2) the proper application of the Pioneer Investment Services Co. "excusable neglect" standards, gives rise to important issues the effect of which extend beyond the scope of the case at hand.

Date: January 26, 1998

STRINGHAM & HILLMAN

By 

Robert Stringham, #23880
Attorney for Petitioners

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A-2 Memorandum Opinion and Order re: Bakruptcy Appeal of United States District Court, Eastern District of California, filed May 23, 1996

A-3 Order Granting Motion for Dismissal of Complaint and for Summary Judgment of United States Bankruptcy Court, Eastern District of California, filed April 26, 1995

A-4 Rule 8002 - Time for Filing a Notice of Appeal

FILED
August 27, 1997
Cathy A. Catterson, Clerk
U.S. Court of Appeals

| | |
|---|---|
| In re: PIPCO FRUIT COMPANY, a California general partnership, Debtor. | No. 96-16346<br>D.C. No. CV-05664-OWW |
| ANGELA PAUL; STEPHEN PAUL; PAUL, SR.; RON PAUL, JR., Appellants, v. A. LEVY AND J. ZENTNER CO., a California corporation, Appellee. | MEMORANDUM* |

Appeal from the United States District Court
for the Eastern District of California
Oliver W. Wanger, District Judge, Presiding

Submitted August 25, 1997**

Before: SCHROEDER, FERNANDEZ, and RYMER, Circuit Judges.

Ron Paul, Sr., Angela Paul, Ron Paul,

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Jr., Brian Paul, and Stephen Paul ("Pauls"), general partners of Chapter 11 debtor, Pipco Fruit Company ("Pipco"), appeal the district court's decision affirming the bankruptcy court's denial of their motion for an extension of time to file a notice of appeal. We have jurisdiction pursuant to 28 U.S. C. Section 158(d), and we affirm.[1]

The Pauls concede that they failed to file their notice of appeal within ten days as required by Fed. R. Bankr. P. 8002. They contend, however, that there was excusable neglect because their attorney's secretary erred in calendaring the due date for filing the notice of appeal. We disagree.

The bankruptcy court's decision to deny an extension of time to file a notice of appeal is reviewed for abuse of discretion.

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[1]The underlying lawsuit alleged that A. Levy and J. Zentner Co. fraudulently or negligently handled the sale of the Pauls' tree fruit, forcing Pipco to file for bankruptcy. The bankruptcy court dismissed the complaint on the ground that it was barred by the res judicata effect of Pipco's confirmed Chapter 11 plan.

See Marx v. Loral Corp., 87 F.3d 1049, 1054 (9th Cir. 1996) (affirming order granting extension to file second notice of appeal); see also Key Bar Investments, Inc. v. Cahn (In re Cahn), 188 B.R. 627, 628 (B.A.P. 9th Cir. 1995) (affirming denial of motion for extension to file appeal even though plaintiff did not receive notice of entry of judgment or order). Under this standard, we cannot reverse unless we have a definite and firm conviction that the lower court committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. See Marx, 87 F.3d at 1054.

A "notice of appeal shall be filed with the clerk within 10 days of the date of entry of the judgment, order, or decree appealed from." Fed. R. Bankr. P. 8002(a). During the 20 days following the 10-day appeal period, a party may request an extension of time for filing a notice of appeal upon a showing of excusable neglect. See Fed. R. Bankr. P. 8002(c).

The Supreme Court has set out the standard to determine whether excusable

neglect exists in the context of a bankruptcy rule. See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd., 113 S. Ct. 1489, 1498 (1993). The determination is an equitable one, depending upon all the relevant circumstances, including: "the danger of prejudice to the [non-movant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was in the reasonable control of the movant, and whether the movant acted in good faith." See id. at 1498. "[I]nadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." Id. at 1496 (footnote omitted).

Twenty-two days after entry of judgment, the Pauls filed a notice of appeal and a motion for an extension of time to file a notice of appeal. We reject the Pauls' contention that excusable neglect justified their late filing because their counsel's secretary did not know the time limit for filing an appeal of a bankruptcy court order, which resulted in the miscalendaring of the

deadline. See Kyle v. Campbell Soup Co., 28 F.3d 928, 931-32 (9th Cir. 1994) (applying Pioneer to hold that lawyer's miscalculation of time in which notice of appeal must be filed did not constitute excusable neglect); see also In re Cahn, 188 B.R. at 632-33 (affirming finding that neglect was not excusable where plaintiff did not receive notice of entry of judgment or order and was misled by defendant's failure to lodge separate judgment); cf. Marx, 87 F.3d at 1054 (affirming finding of excusable neglect where plaintiffs' notice of appeal was one day late due to difficulties encountered in scheduling class meeting). The district court did not abuse its discretion in concluding that, based on its analysis of the factors set out in Pioneer, there was no excusable neglect. See id. at 1053.

AFFIRMED.

A-1

FILED
May 23 9:25 AM '96
GL

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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|---|---|
| In the Matter of<br><br>PIPCO FRUIT COMPANY, a California general partnership,<br><br>Debtor. | CV-F-95-5664-OWW<br><br>MEMORANDUM OPINION AND ORDER RE: BANKRUPTCY APPEAL |
| RON PAUL, SR., ANGELA PAUL, RON PAUL, JR., BRIAN PAUL, STEPHEN PAUL,<br><br>Plaintiffs/Appellants,<br><br>v.<br><br>A. LEVY & J. ZENTNER CO., a California corporation,<br><br>Defendant/Appellee. | 93-10212-B-11F |

## I. BACKGROUND

Debtor Pipco Fruit Company ("Pipco") is a general partnership that grows tree fruit in Fresno County, California. Pipco filed a voluntary petition for bankruptcy under Chapter 11 on January 15, 1993, and a

reorganization plan was confirmed on January 26, 1994. Ron Paul, Sr., Angela Paul, Ron Paul, Jr., Brian Paul, and Stephen Paul (collectively "Appellants") are the general partners of Pipco Fruit Company and brought an action in the Fresno County Superior Court against A. Levy & J. Zentner Co. ("Appellee") on February 1, 1995, for breach of contract, fraud, breach of fiduciary duty, and conversion arising out of Appellee's contractual obligations to market and sell Appellant's tree fruit. This action was removed to the bankruptcy court for the Eastern District of California on February 27, 1995.

On February 28, 1995, Appellee moved for dismissal of the complaint and for summary judgment. The bankruptcy court granted the motion in open court, with both parties' counsel present, on April 24, 1995. Proposed forms of order and judgment in the case were served on Appellants on April 15, 1995. The written order and final judgment were entered on April 27, 1997, and served on Appellants on that date.

Upon receipt of the written order and judgment, the secretary in charge of opening incoming mail and calendaring hearing dates in Appellants' counsel's office mistakenly calendared the deadline for the notice of appeal in this case for 30 days from the date of the order.[1] She then put the order and judgment on the desk in an empty office, which was to be occupied by a new associate assigned to work on the appeal in this case and scheduled to arrive on May 15, 1995. Appellants' counsel filed a notice of appeal to extend time to file a notice of appeal on May 19, 1995.

On June 26, 1995, the bankruptcy court denied the motion to extend time to file the notice of appeal on procedural grounds, relying on In re Mouradick, 13 F.3d 326 (9th Cir. 1994), and also found that Appellants had not shown that their failure to file a timely notice of appeal was due to excusable

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[1]The bankruptcy rules require a notice of appeal to be filed within ten days of the date of entry of order. Fed. R. Bankr. P. 8002(a).

neglect. Appellants filed a timely notice of appeal from the order denying the motion to extend time to file notice of appeal on July 3, 1995.

## II. STANDARD OF REVIEW

A district court reviews de novo a bankruptcy court's conclusions of law. Matter of Lockhard, 884 F.2d 1171, 1174 (9th Cir. 1989). Findings of fact by the bankruptcy judge shall not be disturbed unless they are clearly erroneous. Fed. R. Bank. P. 8013. A bankruptcy court's finding on the issue of "excusable neglect" in a motion to extend time to file notice of appeal is reviewed for abuse of discretion. See Pioneer Investment Services Co. V. Brunswick Associates Limited Partnership, 113 S. Ct. 1489, 1500 (1993).

## III. DISCUSSION

Appellants challenge both the bankruptcy judge's finding that the May 19, 1995 notice of appeal could not be rendered effective by granting the motion to extend time and the finding that Appellants had not shown excusable neglect in failing to file a timely

notice of appeal.

A. Effectiveness of Notice of Appeal

Federal Rule of Bankruptcy Procedure 8002(a) states that a notice of appeal from a bankruptcy court order or judgment must be filed within ten days of the date of entry of the order or judgment. The bankruptcy judge may extend the time to file the notice of appeal for an additional 20 days upon motion by a party within the original ten day time period. Fed. R. Bankr. P. 8002(c). If such a motion is made after the original ten day period, the court may grant the motion upon a showing of excusable neglect.[2] Id.

Because judgment was entered on April 27, 1995 in the adversary proceeding, the notice of appeal from that judgment must have been filed no later than May 7, 1995.[3]

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[2]The bankruptcy court may not grant an extension for any reason if the judgment from which the party intends to appeal decides certain issues as identified in Rule 8002(c). These provisions are not at issue in this case.

[3]The bankruptcy judge calculated the due date as May 8, 1995, but ten days from April 27, 1995, is

Appellants' motion to extend time, filed on May 19, 1995 along with the notice of appeal, was within the 20 days after expiration of the ten day period allowed by Rule 8002(c). At the hearing on the motion to extend time on June 26, 1995, the bankruptcy judge, Judge Dorian, ruled:

> "The notice of appeal was filed in this case on May 19th, 1995, but that notice can be of no legal effect, as the time for filing it had already expired and there was in place no order from this court allowing it to be filed. As such, the notice as a nullity and totally ineffective to confer jurisdiction on the appellate court.
>
> Accordingly, although the request for an extension under Bankruptcy Rule 8002(c) was timely filed and upon proper findings by this Court could have resulted in

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actually May 7, 1995.

a filing of a timely appeal, the ability of this Court to permit that result no longer exists. The ability to confer jurisdiction has expired. This Court cannot revive it."

The bankruptcy judge relied on In re Mouradick, 13 F.3d 326 (9th Cir. 1994). The would-be appellant in Mouradick did not file a notice of appeal within the ten days required by Rule 8002(a), but did file a timely motion to extend time pursuant to Rule 8002(c). Id. at 329.

Judge Dorian interpreted the holding in Mouradick to require the bankruptcy court to hear the motion to extend time within the thirty days to enable an appellant to file a notice of appeal within those thirty days if the motion is granted. Because the hearing on the Rule 8002(c) motion was not heard within the thirty days, Judge Dorian found that he was powerless to allow Appellants to file a notice of appeal.

Mouradick did not explicitly hold that the hearing on a motion to extend time must

be held within the thirty days; it held only that the notice of appeal must be filed within the thirty days. Appellants argue that the bankruptcy court's interpretation of Mouradick creates a procedural impossibility. If a party has missed the ten day deadline and moves for an extension of time on the eleventh day at the earliest, Appellants contend it is impossible for the party to notice the motion for hearing before an additional twenty days have expired. Local Bankruptcy Rule 914(m)(1) requires all hearings to be set not less than 22 days from the date of service of the motion. Appellee argues that the local rules also allow the bankruptcy judge to shorten time for hearing on a motion, citing Local Bankruptcy Rule 914(k), and that Appellants chose not to seek such an order.

A party may obtain an order shortening time. The bankruptcy judge's interpretation of Mouradick is not procedurally impossible. The court has the authority to hear the motion to extend time for filing the appeal on shortened time, even if the motion to

extend time is filed on the 30th day, as allowed under Rule 8002(c). However, Rule 8002(c) states only that a "request" to extend time to file a notice of appeal need be made within the 20 days following expiration of the original ten day time period. The rule does not set any limits for when the hearing must be held or the decision on the motion to extend time must be made.

Apparently, the bankruptcy judge decided that the hearing must be held within thirty days because he did not believe that a favorable decision on a motion to extend time could revive a previously filed, but ineffective, notice of appeal. Unlike the appellant in Mouradick, Appellants here filed a notice of appeal within the thirty day limit. The notice of appeal was not effective at the time it was filed because the court had not authorized a filing outside of the original ten day time period under Rule 8002(c). Appellants argue that the bankruptcy court could have revived the "premature" notice of appeal. The bankruptcy judge considered this argument, but found

that it could not validate the May 19, 1995 notice of appeal.

> "While the plaintiffs may take the position that I can somehow breathe life into their appeal by resort to a nunc pro tunc order, that device is deemed inapplicable and inappropriate here, and its use would totally circumvent every established policy of setting time limits by which parties must act."

The bankruptcy judge referred to no authority in support of this position. In fact, the Ninth Circuit has approved the use of nunc pro tunc orders to validate previously filed notices of appeal.

Mouradick relied on the court's rationale in Selph v. Council of Los Angeles, 593 F.2d 881 (9th Cir. 1979), which considered the jurisdictional requirements of Federal Rule of Appellate Procedure 4(a)(5). Bankruptcy Rule 8002(c) is the analog to Federal Rule of Appellate Procedure 4(a)(5). Mouradick, 13 F.3d at 328. In Selph, the

Ninth Circuit held that a district court had no authority to grant an extension of time to file a notice of appeal beyond the specific time provisions of Appellate Rule 4(a).[4] 593 F.2d at 882. However, the court distinguished the case before it "from those in which a notice of appeal is submitted within the extension period of Rule 4(a) and later rendered timely by an order of the district court (made after the extension period had expired) to file it nunc pro tunc." Id. (citing cases); see also United States v. Layton, 855 F.2d 1388, 1415 (9th Cir. 1988), cert. denied, 489 U.S. 1046 (1989); Salazar v. San Francisco Bay Area Rapid Transit District, 538 F.2d 269, 270 (9th Cir.), cert. denied, 429 U.S. 951 (1976).

The hypothetical nunc pro tunc situation approved in Selph is identical to this case.

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[4]Rule 4(a)(5) was subsequently amended to allow a party to file a notice of appeal within ten days from the district court's order granting the motion to extend time.

Appellants filed their notice of appeal within the extension period, but the decision on the motion to extend time was not made until after the extension period had expired. As another court has noted in a case involving application of Appellate Rule 4(a), "[t]he correct procedure is to file the notice of appeal with the motion to extend time for filing and in no event later than the [applicable] extension period." Moore v. Nelson, 611 F.2d 343, 436 (2nd Cir. 1979). That is exactly what Appellants did here. The bankruptcy judge had jurisdiction and was not prohibited from ordering the notice of appeal filed nunc pro tunc, even though the hearing date had been set after expiration of the 30 day period of Rule 8002(c).

B. Excusable Neglect

Assuming arguendo that its finding on the untimeliness of the motion to extend time for filing the notice of appeal was incorrect, the court also addressed whether Appellants established excusable neglect. In determining that there was no excusable neglect, the bankruptcy judge explained:

"Counsel does not claim that he was mistaken about the time limits, the excuse is that the secretary was mistaken. The timely filing of documents is the primary responsibility of the attorney, and here, there's no showing that the attorney, who was at all times aware of the Court's ruling, took the necessary action to ensure that a timely notice of appeal was filed. Fully 13 days passed from the time the Court announced its ruling until the bar date for filing an appeal expired, and during all that time, counsel was aware of the Court's adverse ruling.

I will further note that a copy of the judgment submitted to the Court was served on counsel on April 25th, 1995, putting counsel on notice that entry of judgment was imminent."

Appellants argue that the bankruptcy

judge's finding was in error because "excusable neglect" is interpreted broadly under Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership, 113 S. Ct. 1489 (1993). Appellee maintains that the Ninth Circuit has not applied Pioneer in cases under Rule 8002(c), and even if the Pioneer definition is applicable here, Appellants have failed to meet it.

1. Application of Pioneer in Ninth Circuit

Pioneer dealt explicitly with the definition of excusable neglect under Bankruptcy Rule 9006(b)(1), which allows enlargement of time to act within a bankruptcy proceeding. The Supreme Court adopted a flexible approach in Pioneer, taking into account "the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." 113 S. Ct. at 1498. The Court held that parties must be held accountable for the

acts and omissions of their attorneys in this context, id. at 1499, and "that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission," id. at 1498. "Neglect" as used in the standard includes negligence, not just inaction. Id. at 1497.

As Appellants point out, several courts have applied the holding in Pioneer to interpret excusable neglect under Bankruptcy Rule 8002(c), though Pioneer did not explicitly consider Rule 8002(c). In Turner v. Ruta, 173 B.R. 165, 167 (Bankr. C.D. Il1. 1994), the court observed that footnote 3 of Pioneer implies that the Court also intended to resolve the split among the circuits concerning the meaning of excusable neglect in the context of Federal Rule of Appellate Procedure 4(a)(5).[5] The Turner court held

[5]Footnote 3 of Pioneer describes the circuit split over Rule 9006(b)(1), then explains that "[t]he Courts of Appeal similarly have divided in their interpretation of 'excusable neglect' as found in

that "[b]ecause the same policy considerations support both Bankruptcy Rule 8002 and [Federal Rule of Appellate Procedure] 4, the standard used for determining excusable neglect should be the same for both." Id. Other courts have reached the same conclusion. E.g., In re Investors and Lenders, Ltd., 169 B.R. 546 (Bankr. D.N.J. 1994); In re Nickels Performance Systems, Inc., 169 B.R. 647 (Bankr. E.D. Tenn. 1994); In re Pyramid Energy, Ltd., 165 B.R. 249 (Bankr. S.D. I11. 1994).

One court that has refused to extend the Pioneer standard to Rule 8002(c) is In re Mowers, 160 B.R. 720 (Bankr. N.D.N.Y. 1993). The court in Mowers found no "clear indication" that Pioneer intended to resolve the split of authority regarding excusable neglect in Appellate Rule 4(a)(5). Id. at 724. Moreover, it found that the policy of

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Rule 4(a)(5) of the Federal Rules of Appellate Procedure," and describes the split with several citations. 113 S. Ct. At 1494 n.3.

assuring prompt appellate review in bankruptcy, which is evidenced by the abbreviated time constraints for filing notices of appeal, did not support application of the lenient Pioneer standard to Rule 8002(c). Id.

Appellee argues that the Ninth Circuit interprets excusable neglect strictly in cases involving late notices of appeal, and has not adopted the Pioneer standard. Appellee directs the court to In re Magouirk, 693 F.2d 948, 950 (9th Cir. 1982), in which the Ninth Circuit strictly construed excusable neglect, in the precursor to Bankruptcy Rule 8002, to require a finding that the party failed to learn of the entry of judgment or a finding of extraordinary circumstances. Appellee also cites In re Dahnken's of Santa Barbara, Inc., 11 B.R. 536, 538 (Bankr. 9th Cir. 1981), in which the court denied a one day extension of time based on the same strict construction of excusable neglect. The Ninth Circuit rule, prior to Pioneer, was that where "the purpose of the extension sought is to review the

propriety of a decision on the merits, such as in the context of a late filed notice of appeal, the term excusable neglect must be strictly interpreted." In re Dix, 95 B.R. 134, 138 (Bankr. 9th Cir. 1988).

The Ninth Circuit has spoken with regard to this issue since the Pioneer decision. In Reynolds v. Wagner, 55 F.3d 1426, 1429 (9th Cir.), cert. denied, 116 S. Ct. 339 (1995), the court found that "excusable neglect" in the context of Appellate Rule 4(a)(5) has the same meaning as the Supreme Court determined in Pioneer. The Ninth Circuit Bankruptcy Appellate Panel approved the use of the Pioneer standard in a Bankruptcy Rule 8002(c) motion to extend time to file a notice of appeal in In re Cahn, 188 B.R. 627, 631-32 (Bankr. 9th Cir. 1995). The court in Cahn reasoned that, because "[b]ankruptcy rules are generally construed in the same manner as the Federal Rules of Appellate Procedure," Reynolds provided the authority to apply the expansive excusable neglect standard of Pioneer to Rule 8002(c). Id. at 632. The Pioneer definition of excusable neglect is

applicable here.

2. Finding of Excusable Neglect

The bankruptcy judge did not identify which definition of excusable neglect he applied in his analysis. Nevertheless, in light of the factors identified in Pioneer, the bankruptcy judge did not abuse his discretion in determining that Appellants had failed to demonstrate excusable neglect.

The first factor that must be considered is the danger of prejudice to the debtor. In the context of Bankruptcy Rule 8002(c), the Bankruptcy Appellate Panel of the Ninth Circuit has interpreted this element to include the danger of prejudice to the nonmoving party. Cahn, 188 B.R. at 631. Appellee has not shown any prejudice that would result by allowing Appellants to appeal the bar of their state court action though the notice of appeal was untimely. The bankruptcy case was two and a half years old at the time of the appeal; a plan had been confirmed and the creditor/Appellee had been paid in part. (Excerpt of Record, Exh. 2.)

The court must also take into account

the length of the delay and its potential impact on judicial proceedings. Appellants delayed only 12 days in filing their notice of appeal. The impact of such delay on judicial proceedings is minimal. The issue presented to the bankruptcy court was whether Appellants could proceed with a state court lawsuit concerning business dealings that the bankruptcy judge found to be barred by claim preclusion arising out of the concluded bankruptcy proceedings.

The reason for the delay and whether it was within the reasonable control of the movant is the third factor to consider in determining excusable neglect. Here, the reason is that Appellants' counsel's secretary mistakenly calendared the due date for the filing of the notice of appeal as thirty days from the date of entry of the order and placed the relevant paperwork in an office that was not to be occupied by a new attorney until after the actual filing deadline. The bankruptcy judge did not consider such neglect as excusable. He held Appellants' counsel responsible for the

mistake of failing to keep informed of and meet the appeal notice filing deadline. Appellants' attorney was present at the hearing when the judge rendered his oral decision to dismiss Appellants' case and therefore was aware of the adverse ruling and the need to appeal.

Appellants cite to two California cases that have considered clerical errors as excusable neglect: Elston v. City of Turlock, 38 Cal. 3d 227, 234-35 (1985), and Palmer v. Moore, 266 Cal. App. 2d 134, 141 (1968). It is questionable whether these state cases are applicable in the area of federal procedure and bankruptcy law. In any event, the cases are not entirely supportive. In Elston, understaffing of counsel's office caused a request for admissions to be misplaced so that counsel did not respond to the request in time. 38 Cal. 3d at 234-35. The court found it relevant that counsel was not even aware that the opposing party had requested admissions until the answers were overdue. Id. Here, Appellants' counsel was aware of the court's adverse ruling.

More relevant are the federal cases that have analyzed excusable neglect under Bankruptcy Rule 8002(c) using the Pioneer standard. They, too, have considered whether counsel was aware of the need for action on a particular matter in determining whether counsel may be held accountable for the neglect. The court in In re Pyramid Energy, Ltd., 165 B.R. 249, 251 (Bankr. S.D. I11. 1994), found that counsel was present when the court announced its oral ruling and that at that time counsel contemplated appealing from the court's order. When the written order finally arrived at counsel's office, counsel failed to file the notice of appeal in time because of various personnel absences during that week. Id. The court noted that Pioneer gave little weight to evidence that counsel was experiencing "upheaval" in his office, so that problems with "the tickler system" in counsel's office were not excusable. Id. at 251-52.

In In re Nickels Performance Systems, Inc., 169 B.R. 647, 651 (Bankr. E.D. Tenn. 1994), the written order was never seen by

counsel, apparently because it had gotten stuck to the bottom of another file on counsel's desk. Despite the ambiguity over the fate of the written order, the court held counsel accountable for the late filing of the notice of appeal because counsel had been present at the oral ruling and knew that a written order would be forthcoming shortly. Id. In addition, counsel admitted and the court found relevant that, during the applicable ten day filing period, counsel discussed the intention to appeal the ruling and wondered why the written order had not been received, but failed to check the court file to determine if an order had been issued. Id.

Finally, in In re Investors and Lenders, Lt., 169 B.R. 546, 548 (Bankr. D.N.J. 1994), various creditors who failed to file a timely notice of appeal argued that they did not receive the written order of judgment against them until one day after the notice of appeal was due. The court ruled this was not excusable neglect because the creditors were aware of the court's adverse ruling before

entry of the order and could have filed of a notice of appeal prior to entry of the order pursuant to Bankruptcy Rule 8002(a). Id. at 550-51. The court further found that the creditors were on notice that a written order was forthcoming because they were served with the proposed form of order. Id.

Each of these cases suggests that Appellants' counsel's failure to file a timely notice of appeal is not excusable. Appellants' counsel was present at the hearing on the motion for summary judgment and dismissal and knew of the adverse ruling. Counsel knew a written order was being processed, as he received a copy of the proposed form of order and judgment served on April 25, 1995. Counsel had decided to appeal the order before receiving the written order, as is evidenced by the assignment of the appeal to a new associate who was scheduled to arrive in the office on May 15, 1995. (See Declaration of Kate Holly, Excerpt of Record, Exh. 14.) Regardless of the glitches in counsel's "tickler system," it was counsel's duty to be aware of the entry

of the order and to assure that the notice of appeal was timely filed. In re Delaney, 29 F.3d 516, 518 (9th Cir. 1994) ("Parties have an affirmative duty to 'monitor the dockets to inform themselves of the entry of orders they may wish to appeal.'").

That it was the secretary's conduct which caused counsel's untimely filing is not excusable. The failure of counsel to understand the rules or to properly apply them is generally not excusable neglect. Pioneer, 113 S. Ct. at 1496. The attorney is chargeable with any errors of the attorney's staff as is the client, id. at 1499, so that the proper inquiry is whether the neglect of the client and the attorney is excusable. The attorney is hired to represent the client and cannot attribute the mistake of his staff as other than his own, except if it is so far beyond tne course and scope of the employee's duties that it would be inequitable to charge the conduct to the attorney.

The final factor in the Pioneer analysis asks whether the movant acted in good faith. 113 S. Ct. at 1498. There is no evidence

suggesting that Appellants acted in bad faith.

The case ultimately turns on whether the bankruptcy judge erred in finding an absence of excusable neglect. The focus of the test is not so much on the absence of prejudice as it is on the nature, quality of, and reason for the neglect: i.e., its cause. Here, the attorney has not offered an explanation of whether he was or was not aware of the ten day appeal period; whether he discussed it with the clients; whether he discussed it with the secretary; whether he reviewed the court order; or whether he gave any further thought or attention or took any further action to timely filing the notice of appeal, before the error was discovered. The evidence of cause for neglect was at best incomplete and, without explanation of the attorney's actions and knowledge during the period, provides the basis for the inference of indifference or inexcusable inattention to the matter of the perfection of the right to appeal. The exercise of equitable discretion must be premised upon the requirements of the

law. Here, no prejudice arises, nor is the delay significant. However, the neglect is admitted, and the excuse is solely that the attorney's assistant made the mistake. It cannot be determined whether the attorney was mistaken about the ten day requirement because he did not say so, even after being afforded further opportunity to explain at the hearing on the motion. The standard of review is deferential; the bankruptcy judge did not abuse his discretion when he found that Appellants had failed to establish excusable neglect.

IV. CONCLUSION

For the foregoing reasons, the order of the bankruptcy court denying the Appellant's motion for extension of time to file a notice of appeal is AFFIRMED.

SO ORDERED.

DATED: May 22, 1996.

/s/ Oliver W. Wanger
Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

HON. OLIVER W. WANGER

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| PIPCO FRUIT CO.; PAUL, et al, Appellants, vs. LEVY & ZENTNER, et al., Appellees, | NO. CV-F-95-5664-OWW<br>ORAL ARGUMENT RE BANKRUPTCY APPEAL |

Fresno, California Monday, May 20, 1996

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Peggy J. Smith, Official Reporter

COPY

A-2

APPEARANCES OF COUNSEL:

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Monday, May 20, 1996 Fresno, California

9:00 a.m.

THE CLERK: Item 1 is Civil F-95-5664, Paul Levy versus Zentner, oral argument in bankruptcy appeal.

MR. UREMOVIC: Joseph Uremovic.

MR. BERRYMAN: Alfred Berryman, appearing for the appellee.

THE COURT: All right. Let me give you my preliminary indication on the case and then you can present any arguments you wish accordingly.

This case arises out of a bankruptcy proceeding that dismissed on summary judgment a removed case that had been initiated in the state court by the debtors. And the bankruptcy court found that the state action was, in effect, barred by prior claim preclusion by virtue of the bankruptcy.

The case, having been terminated in the bankruptcy court, was then the subject of an appeal by the debtors. And the appeal process was interdicted in the attorney for the debtors' office by virtue of a

misplacement of the file in the office of an attorney that had not yet joined the law firm, and instead of filing the notice of appeal within the ten days required under the bankruptcy rule, the notice of appeal was actually filed, along with a motion to extend the time for the filing of the notice of appeal, before the expiration of the 20-day period provided by Bankruptcy Rule 8002(c), and the matter was set on the calendar of the bankruptcy court at a time beyond the 30 days.

When the matter came on for hearing, the bankruptcy judge held that the court was without jurisdiction, and that the 30-day period was absolute, and that, therefore, the court lacked the power, as he put it, "to breathe life into the appeal." And the court went on to analyze under the excusable neglect standard, although the judge did not indicate which of the excusable neglect standards that he was applying, and found that there was insufficient justification in any event and, therefore, denied the motion

to extend the appeal.

The issue, therefore, that is presented in ultimate terms is whether the bankruptcy court erred in ultimately denying the motion to extend the time for appeal.

Just as an aside, the appellant has indicated that, apparently, there is a new action that is filed in the state court by the creditor, and attached the pleadings, which are in the nature of a foreclosure. And having been away from the state practice for a long time, as I remember former Code of Civil Procedure 440, which was the compensation offset statute, that when somebody sues you, if there have been cross-demands that have existed, even if they are barred by the statute of limitations, they can still be asserted by way of offset. And so just as an aside, whatever the outcome on the issue here doesn't necessarily mean that as long as the creditor has sued the debtor that those claims may not be assertible. But I'm not expressing an opinion on that, of course, because that is unrelated to the

issues that are here for decision.

The timing in this case, as I count the days, ten days from April 27th, 1995 would be May the 7th of 1995, that the appeal notice was to be filed. And, in fact, the appeal notice was filed on the 19th, which was 12 days into the 20-day period allowed by 8002(c).

In looking at the cases that interpret these sections, the bankruptcy judge relied on **In re Mouradick**, where the facts are similar. There the notice of appeal was not filed within the ten days. A timely motion to extend the time was filed, and then 76 days after the entry of the appealed order the bankruptcy court permitted the appellant to file, within three days, the notice of appeal.

There, the court, on appeal, the appellate court, held that the time was gone because the notice of appeal hadn't been filed. It was jurisdictional. And the 30 days barred the ability to file the notice of appeal.

Here, the appellant, contrary to **Mouradick**, did file the notice within the 30-day period, and, therefore, the **Mouradick** holding, which is not explicit, it doesn't say that the motion to extend the time must be heard within the 30 days, rather, it holds that the notice of appeal must be filed within the 30 days. And here the plaintiff argues that it's practically impossible with a 22-day notice period to file within and have the matter heard within the 30-day period.

But, of course, nothing is to prevent, unless there is some factual impossibility that can be shown, a party from moving to shorten time and seeking that relief from the bankruptcy judge, which was not done here. This -- as far as I can tell from the papers, this matter was set just in the ordinary course, assumedly by contacting the bankruptcy clerk rather than seeking an application to shorten the time, which is allowed both under the bankruptcy rules and under the local rules. 914(k) is the local

rule, local bankruptcy rule that permits shortening time.

The **Mouradick** case considered the **Selph**, S-E-L-P-H case, another Ninth Circuit case, which addresses Federal Rule of Appellate Procedure 4(a)(5), concerning the extension of time when the appeal is being taken to the circuit court, and that case holds that the district court has no authority to grant a time extension beyond the specific time that the rule provides for extending time.

And the court distinguished the case in finding that an appeal could not be filed in **Selph** from those in which a notice of appeal is submitted within the extension period and later, in effect, made timely by an order that files it nunc pro tunc. And a number of cases are cited, Ninth Circuit cases, for that proposition.

Therefore, the bankruptcy court's finding that the court lacked jurisdiction to consider the matter seems not to be an accurate reading of the cases, and the question becomes whether, assuming that this

motion could have been heard, was the failure to have it heard within the 30-day period the result of excusable neglect, which would permit the matter to proceed.

The United States Supreme Court has discussed the definition of "excusable neglect" in **Pioneer Investment Services Company v. Brunswick Associates, Limited Partnership.** And that case, in discussing excusable neglect, talks about the standard as being one that is interpreted broadly.

In fact, the appellant indicated here, which I was somewhat puzzled, Mr. Uremovic, because there is a case in the Ninth Circuit that applies the standard, its **Reynolds v. Wagner**, 55 Fed.3d 1426, 1429, in which cert was denied by the U.S. Supreme Court in 1995. And there, the Ninth Circuit, in discussing and interpreting the **Pioneer Investment** decision, found that excusable neglect has the same meaning that the Supreme Court said it did in **Pioneer Investment.** And the Ninth Circuit Bankruptcy Appellate Panel has also applied the **Pioneer** standard in a case called

**In re Cahn**, C-A-H-N, 188 Bankruptcy Reporter 627. There, the appellate panel court found that because bankruptcy rules are generally construed in the same way as the appellate -- federal rules of appellate procedure, that the expanse of excusable neglect standard was appropriate to apply.

Basically, there are three factors that are reviewed under the expansive standard: The danger of prejudice to the debtor; the length of the delay and its potential impact on judicial proceedings; and the reason for the delay, and whether it was within the reasonable control of the moving party.

Here, considering the first factor, the action was taken before the expiration of the period in which the extension could have been granted, and the case was a case that was, basically, two and a half years old. It was a case in which a plan had been confirmed and, according to the papers -- I mean I didn't check the bankruptcy file, but is there any dispute that Levy Zentner was satisfied by the liquidation of the

bankruptcy estate in the underlying proceedings? That's what the appellants says. Is there any reason to doubt that?

MR. BERRYMAN: That's not a correct statement, your Honor.

THE COURT: Not correct?

MR. BERRYMAN: No. Both parties are bound by the terms of the confirmed plan of reorganization, but the Levy Zentner claim was not extinguished by the disposition of the real property in the bankruptcy court.

THE COURT: All right. I had understood that on the liquidation of the assets that the claim was satisfied.

MR. BERRYMAN: That is not correct.

THE COURT: All right. At any rate, the issue that was presented to the bankruptcy court in considering the question of excusable neglect was whether the state should proceed and -- the state suit. And, again, I didn't have the state lawsuit in front of me and I couldn't match the time periods, but I'm inferring that the state lawsuit had had to, based on the bankruptcy

court's ruling, it would have had to have been for periods of time that either preceded the bankruptcy or were up to the time that the plan was confirmed, because if the actions concerned occurred afterwards, and if the debtor had activities, although, it would not stand to reason that they did if they lost their properties, then perhaps the claims could have been alive.

But I understood all of these to be claims that would have existed prior to the extinguishment by the confirmation of the plan. Is that accurate?

MR. BERRYMAN: That is accurate in my view, your Honor.

MR. UREMOVIC: Well, actually, the plaintiffs in our state court action were the partners and not the bankrupt itself, so it was the partners that were suing Levy Zentner for fraud in the handling of the fruit which, in essence, caused those individuals to lose all their assets, their ranches, their homes, everything.

THE COURT: All right. Because,

ordinarily, if, you know, if that had been the claim of the Pauls, they would have asserted that as an adversary proceeding in the bankruptcy or they could have sought leave from the bankruptcy court or their trusts, if they had a trustee, to pursue that while the bankruptcy was proceeding.

MR. UREMOVIC: That's correct. And in the plan they reserved their right. In the plan there was an indication that the Bureau of Market Enforcement was going to do an audit of the books of Levy Zentner, and the result of that audit would be a credit for Pipco from the monies retained by Levy Zentner.

MR. BERRYMAN: On the issue of the partners asserting their own individual claims, however, a basis for the bankruptcy court's ruling on the summary judgment motion that dismissed the case was that the partners' claims were also treated in the Chapter 11 plan and the claim preclusion rule applied to dispose of their case.

THE COURT: Even the outside -- not the

Pauls, their outside partners?

MR. BERRYMAN: There were no outside partners.

THE COURT: Oh, all right. But all of them didn't go through bankruptcy, just the partnership.

MR. UREMOVIC: That's correct.

THE COURT: All right. Now we turn to the inquiries.

So these factors are -- it's hard to see what 12 days' delay is going to do in terms of the overall prejudice, and these factors do not necessarily militate against the finding of excusable neglect.

The last factor is troublesome. The reason for the delay, and whether it was in -- within the reasonable control of the movant. And here the appellant's counsel's secretary mistakenly calendared the appeal for 30 days, which is the standard time for a civil appeal in federal court, instead of the ten days that the bankruptcy rule provides, and then to compound the mistake, put the file into an empty office that was awaiting

the arrival of an attorney.

Now, there are a couple of things that are puzzling here, because these cases, of course, are hard cases. The secretary is the attorney's agent, and the attorney is responsible for the secretary's actions, and that's the law. It always has been. Unless we could show that the secretary went so far beyond the course and scope of his or her duties that the attorney shouldn't be chargeable with the secretary's conduct.

Here, basically, what we have is we have a mistake about the rules, in other words, a misinterpretation, and then the placing of the file to be worked on by an attorney who wouldn't be there until beyond the time period. The attorney wasn't going to arrive until the 15th of May and, of course, the 7th of May was the fail safe date for the filing of the notice of appeal. And so the cases, I should say, are legion that that kind of area, particularly in federal practice -- and it's not the state standard, it's the federal standard that applies here -- are not ones

that can be relied on for excuse.

And then the bankruptcy judge analyzed the case to, in effect, say that the debtor's attorney was before the court, knew that there was going to be an appeal and, in effect, is chargeable and should follow the case no matter what, independently, and so, in effect, found that the neglect was not excusable because there is no difference, the clerk's error or the secretary's error is the attorney's error or responsibility.

And so that's where I see the difficulty in the case, and I will hear your arguments. I have read your papers, obviously, but I will hear your arguments on the issue, because that's what I think it comes down to. It comes down to the federal standard of excusable neglect. And ordinarily, the rule is a strict one in Ninth Circuit.

So why don't you, Mr. Uremovic, because it is your appeal, why don't you, if you would, address that issue, unless you want to say something about the other issues.

My sense of this is that the court could

have extended the time. I don't know why, on the 19th, quite frankly, you didn't go in and ask. But you can address it if you want. You didn't go and ask the judge to set the thing on shortened time and get the order within the 20 days.

And then remember what the review standard is here. It's a deferential standard. It's an abuse of discretion, in effect, on applying the excusable neglect standard.

So that's what I think you should focus on, but, of course, you are free to argue anything that you wish.

MR. UREMOVIC: Well, I don't know what more I can say about it. The fact is we didn't file the notice of appeal in a timely fashion. When it was discovered that the appeal should have been filed within the ten-day period, we consulted with a number of different people who specialized in bankruptcy law, which we do not. All of them advised us that the proper procedure was to file the notice of appeal immediately and the

motion for relief, and each of them advised us that we had a proper grounds for excusable neglect.

And, frankly, I don't know, as I read through the cases, what excusable neglect might be. The fact is we missed the time. I think we were diligent. My clients' or the debtor's assets have long ago been liquidated. They were in the hands of the Levy Zentner Company. I see no prejudice to anyone, and I think, procedurally, the Pauls have a right to a day in court.

I understand that the reason for the short ten-day period for filing of appeals in bankruptcy court is so that there are not problems in administering the bankruptcy estate. Things have to move quickly where you have debts accumulating, where you have deteriorating assets. Those facts do not exist here in this particular circumstance.

The secretary, in our case, calendared the matter. I came back from court, gave her the file. She calendared the matter for, in essence, a state court appeal. She

calendared for followup in 30 days and a final final at 60 days, and put the file on the desk of an attorney who had federal bankruptcy experience and was starting work the next week. And those are the facts and I don't know what else I can say about them.

THE COURT: All right. Thank you very much, Mr. Uremovic.

MR. BERRYMAN: Your Honor, I don't have a great quarrel with the Court's preliminary analysis of the other issues. I do agree it comes down to this issue, and as the Court indicated, the cases are legion that counsel's miscalculation of some factual matter has I can almost say never been shown to constitute excusable neglect in the Ninth Circuit. And I believe that it is significant that we never heard from the attorney who was going to start work the following week. There was never any evidence in the record about what that attorney did with the file when he finally did show up. But I don't know that that makes a great deal of difference.

The bankruptcy court's discretion on this point was, I believe, properly exercised, and this Court should affirm the bankruptcy court's ruling.

THE COURT: All right. Anything further?

MR. UREMOVIC: No, your Honor.

MR. BERRYMAN: No, your Honor.

THE COURT: All right. I'm going to look at the cases one more time. The difficulty, Mr. Uremovic, as I stated at the outset, the excusable neglect standard in this court, in the Ninth Circuit, is a much different standard from the state standard. And I'm going to reread the Supreme Court case and give the matter a little further consideration. But I will get my decision out to you shortly, because the analysis is all done. I'm just rereading these cases, as I have indicated. So thank you very much.

MR. BERRYMAN: Thank you, your Honor.

MR. UREMOVIC: Thank you.

(The proceedings were concluded.)

I, PEGGY J. SMITH, Official Reporter, do hereby certify that the foregoing transcript is true and correct.

DATED: September 22, 1996.

/s/ Peggy J. Smith
PEGGY J. SMITH

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FILED
April 26, 1995
Clerk, United States Bankruptcy Court, Eastern District of Calif.

ENTERED ON DOCKET
April 27, 1995
United States Bankruptcy Court
Eastern District of California

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| In Re | NO. 93-10212-B11F |
| PIPCO FRUIT COMPANY, California general partnership, | ADVERSARY PROCEEDING NO. 95-1052 |
| Debtor. | MC NO. AJB-1 |
| | ORDER GRANTING MOTION FOR DISMISSAL OF COMPLAINT AND FOR SUMMARY JUDGMENT |
| RON PAUL, SR., ANGELA PAUL, RON PAUL, JR., BRIAN PAUL, STEPHEN PAUL, | DATE HRG: 4/24/95 |
| Plaintiffs, | TIME HRG: 2:00 PM |
| vs. | LOCATION: Courtroom B, 2nd Floor, Federal Building, 1130 "O" Street, Fresno, CA |
| A. LEVY & J. ZENTNER CO., a California corporation, and Does 1 through 100, | Judge: Honorable Brett Dorian |
| Defendants. | |

On April 24, 1995, the within matter

came on for a continued hearing on the Motion for Dismissal of Complaint and for Summary Judgment filed by Defendant, A. LEVY & J. ZENTNER COMPANY. Plaintiffs appeared by counsel, JOSEPH A. UREMOVIC. Defendant appeared by counsel, ALBERT J. BERRYMAN. There was no appearance by the Debtor, or the United States Trustee, or any other party in interest. The matter was submitted, and the Court announced its decision, and the reasons for the decision were stated into the record. In accordance with the Order Granting Motion for Dismissal of Complaint and for Summary Judgment filed concurrently herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the within action is dismissed.

DATED: April 26, 1995.

/s/ Brett Dorian
BRETT DORIAN
UNITED STATES
BANKRUPTCY JUDGE

A-3

Rule 8002

TIME FOR FILING A NOTICE OF APPEAL

(a) **Ten day Period.** The notice of appeal shall be filed wit the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from. If a timely notice of appeal is filed by a party, and other party may file a notice of appeal within 10 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires. A notice of appeal filed after the announcement of a decision or order but before entry of judgment, order or decree shall be treated as filed after such entry and on the date thereof. If a notice of appeal is mistakenly filed wit the district court of the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel shall note thereon the date on which it was received and transmit it to the clerk and it shall be deemed filed with the clerk on the date so noted.

(b) **Effect of Motion on Time for Appeal.** If any party makes a timely motion of a type specific immediately below, the time of appeal for all parties runs form the entry of the

order disposing of the last such motion outstanding. This provision applied to a timely motion.

(1) to amend or make additional findings of fact under Rule 7052, whether or not granting the motion would alter the judgment;

(2) to alter or amend the judgment under Rule 9023;

(3) for new trial under Rule 9023; or

(4) for relief under Rule 9024 if the motion is filed no later than 10 days after the entry of judgment. A notice of appeal filed after announcement or entry of judgment, order, or decree but before disposition of any of the above motions is ineffective to appeal from the judgment, order, or decree, or disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Rule 8001, to amend a previously filed notice of appeal. A party intending to challenge an alternation or amendment of the judgment, order, or decree shall file a notice, or an amended notice, of appeal within the time prescribed by this Rule 8002 measured from the entry of the order disposing of the last such motion

outstanding. No additional fees will be required for filing an amended notice.

(c) **Extension of Time for Appeal.** The bankruptcy judgment may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days form the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be made before the time filing a notice of appeal has expired, except that a request made no more than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect if the judgment or order appealed from does not authorize the sale of any property or the obtaining of credit or the incurring of debt under § 364 of the code, or is not a judgment or order approving a disclosure statement, confirming a plan, dismissing a case, or converting the case to a case under another chapter of the Code.

Supreme Court, U.S.
FILED
FEB 26 1998
CLERK

97-1233

In The

# Supreme Court of the United States

October Term, 1997

RON PAUL, SR., ANGELA PAUL, RON PAUL, JR., BRIAN PAUL, STEPHEN PAUL,

*Petitioners,*

*v.*

A. LEVY & J. ZENTNER CO., a California Corporation,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.*

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED FOR REVIEW

Respondent disagrees with the statement of questions presented for review in the Petition.

The sole question presented for review is whether the Court should exercise its discretion to grant the petition, when the petitioners have not shown any conflict in the Circuit courts over the applicability of the standards of *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993) (hereafter "*Pioneer Investment*" or "*Pioneer*"), to cases interpreting rule 8002(c) of the Federal Rules of Bankruptcy Procedure, or any misapplication of the *Pioneer* case by the courts below.

## PARTIES TO THE PROCEEDING

The parties to this proceeding are accurately described in the Petition. Respondent A. Levy & J. Zentner Co. is a California corporation. It has never issued shares to the public. It has no parent companies, subsidiaries or affiliates which have issued shares to the public.

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## STATEMENT OF THE CASE

Petitioners are the general partners of a Debtor operating under a Chapter 11 plan of reorganization. The plan was confirmed by the bankruptcy court in the Eastern District of California in January of 1994. Respondent is one of the creditors whose claims were treated in the confirmed plan.

On February 1, 1995, Petitioners filed suit against Respondent in the Superior Court of California, in Fresno County. On February 27, 1995, Respondent removed that lawsuit to the bankruptcy court which had confirmed the partnership's Chapter 11 plan.

The next day, Respondent filed a motion under Fed.R.Civ.P. 12(b) and Fed.R.Civ.P. 56(b) for summary judgment and for dismissal of the complaint, on the ground that confirmation of the Chapter 11 plan operated as a res judicata preclusion of all of the Petitioners' claims alleged in the complaint. Petitioners opposed the motion. At a hearing on April 24, 1995, the bankruptcy court granted the motion and ordered the case dismissed. A written order granting summary judgment and a written judgment dismissing the case were filed on April 26, 1995. The judgment was entered on April 27, 1995.

On May 19, 1995, 22 days after entry of the judgment, Petitioners filed a notice of appeal from the judgment. Concurrently, Petitioners filed a motion to extend their time to file a notice of appeal.[1]

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[1] Rule 8002(a), Federal Rules of Bankruptcy Procedure, requires that a notice of appeal from a bankruptcy court judgment be filed within ten (10) days of entry of the judgment.

In support of their motion, Petitioners filed a declaration of their counsel, in which he admitted receiving written notice of entry of the judgment on April 28, 1995.[2] He further declared that his secretary did not know the time limit for appealing a bankruptcy court order, which caused the deadline for filing the notice of appeal to be miscalendared. By an order entered on June 30, 1995, the bankruptcy court denied the motion for leave to file the late appeal.

Petitioners filed a timely Notice of Appeal from that order on July 3, 1995. The appeal was assigned to the district court for the Eastern District of California. The district court heard oral argument on the appeal on May 20, 1996. At that time, the district court judge asked Petitioners' counsel to provide any further explanation why he missed the deadline. He failed to do so, admitting he did not know the time limitations imposed by the Bankruptcy Rules. He said his secretary calendared the appeal deadline as though State Court time limits were applicable.

The district court issued a Memorandum Opinion and Order affirming the bankruptcy court's ruling on May 23, 1996. Petitioners appealed. The Court of Appeals for the Ninth Circuit issued a Memorandum Order on August 27, 1997, affirming the district court's ruling.

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[2] Petitioners' present counsel was not their attorney in any of the cases below.

## REASONS FOR DENYING THE PETITION FOR CERTIORARI

**There Is No Conflict In The Circuit Courts Over The Applicability Of Pioneer Investment To Rule 8002 Of The Federal Rules of Bankruptcy Procedure.**

Rule 10 of this Court's Rules provides, in pertinent part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another court of appeals on the same important matter. . .

In applying Rule 10, a principal purpose of certiorari jurisdiction is to resolve conflicts among the courts of appeal concerning the meaning of provisions of federal law. *Braxton v. United States* 500 U.S. 344, 348, 111 S.Ct. 1854, 1857, 114 L.Ed.2d 385 (1991).

Petitioners assert that the circuit courts are in conflict over the applicability of the "excusable neglect" standards of the *Pioneer* decision to cases involving Bankruptcy Rule

8002(c). Despite this assertion, Petitioners fail to cite any circuit court decisions which are in conflict.

Petitioners cite two circuit court cases to support their argument about a conflict among the circuits over the applicability of *Pioneer* to cases involving Rule 8002(c). Only one of the cases, *Christopher v. Diamond Benefits Life Ins. Co.*, 35 F.3d 232 (5th Cir. 1994), involves Rule 8002(c). In *Christopher*, the Fifth Circuit simply stated that the *Pioneer* standards apply to a motion for leave to file a late appeal, and that the case should be remanded for factual findings which justified the granting of the motion to extend time. 35 F.3d at p. 236.

Petitioners also cite *Kyle v. Campbell Soup Co.*, 28 F.3d 928 (9th Cir. 1994), *cert. denied* 513 U.S. 867, 115 S.Ct. 185, 130 L.Ed.2d 119 (1994). This case did not involve Rule 8002(c); rather it construed Federal Rule of Civil Procedure 6(b), which is similar to Rule 8002(c). In discussing *Pioneer*, the Ninth Circuit concluded that the type of excusable neglect which occurred in *Pioneer* was not present, where appellant's counsel was mistaken in his interpretation of an unambiguous rule.

Petitioners also cite a number of bankruptcy court decisions which have analyzed the excusable neglect issue. None of those cases supports the theory espoused by Petitioners, which is that their previous attorney's ignorance of an unambiguous rule amounted to excusable neglect.

Consequently, Petitioners have failed to demonstrate any conflict among the circuits. Since there is no conflict among the circuits, the Court should deny the Petition.

**The Ruling By The Ninth Circuit Court Did Not Decide An Important Federal Question In A Way That Conflicts With Relevant Decisions Of This Court.**

Rule 10 of this Court's rules further provides, in pertinent part:

> (c) . . . a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court . . .

Petitioners' second argument appears to focus on a perceived misinterpretation of *Pioneer* by the Ninth Circuit, which could arguably meet Rule 10(c)'s standard. Petitioners complain that the Court of Appeal, the district court and the bankruptcy court all focused on the fact that the only reason given for the late appeal was their own counsel's ignorance of the deadline imposed by Rule 8002(c).

This position is clearly in conflict with the *Pioneer* decision itself. Under *Pioneer*, the factors to be considered are (1) danger of prejudice to the non-movant, (2) length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay and whether it was in the reasonable control of the movant and (4) whether the movant acts in good faith. 507 U.S. at 395, 113 S.Ct. at 1498.

In addition, *Pioneer* discusses a fifth factor, which is whether clients should be penalized for their counsel's mistake or neglect, with the focus "upon whether the neglect of respondents and their counsel was excusable", because clients

are held accountable for the acts and omissions of their counsel. 113 S.Ct. at 1499. Most significantly, *Pioneer* provides that "[i]gnorance of the rules, or mistakes construing the rules do not usually constitute 'excusable neglect.' " 113 S.Ct. at 1496.

Petitioners have failed to show any misapplication of *Pioneer* to this case by any of the courts below. Rule 8002(a) is clear and unambiguous. Petitioner's former counsel never claimed to be confused over the meaning of the rule; rather, his problem was that he simply did not know the rule existed.

In exercising its discretion, the bankruptcy court held Petitioners accountable for the acts and omissions of their previous counsel. The district court and the Circuit court's opinions did not find any abuse of that discretion. Although *Pioneer* may not have been applied the way the Petitioners wanted it to be, it was applied properly.

In the three years which have ensued since the underlying litigation was commenced, Petitioners have never shown any evidence of excusable neglect; instead, they demonstrated only their attorney's ignorance. That ignorance by itself is not "excusable neglect," to allow relief from his failure to file a timely notice of appeal. *Pioneer*, 113 S.Ct. at 1496.

Since the Circuit Court properly applied *Pioneer* to this case, the Petition should be denied.

## CONCLUSION

Petitioners have failed to demonstrate any conflict in the circuit courts, or any misapplication of the *Pioneer* decision by the courts below. They have also failed to demonstrate any compelling reason for the Court to grant the Petition. Accordingly, certiorari should be denied.

Respectfully submitted,

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